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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 240

PAUL E. McDANIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. IV, 1832–1841; Pet. App. 6a–14a) is reported at 343 F. 2d 785.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1965. A petition for rehearing was denied on May 11, 1965. The petition for a writ of certiorari was filed on June 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is reversible error to admit into evidence as a business record a memorandum prepared in connection with the filing of a civil suit, where the

facts mentioned in the memorandum were otherwise proved at the trial.

2. Whether summaries of corporate records were properly admitted into evidence.

3. Whether the trial court properly instructed the jury and properly exercised discretion in not submitting written instructions to the jury.

4. Whether the convictions may properly rest on the mailings charged in the indictment.

STATEMENT

Petitioner was convicted after a trial by jury of conspiracy to violate the Securities Act of 1933, use of the mails to defraud by the offer or sale of securities in violation of 15 U.S.C. 77q(a) (37 counts) and selling unregistered securities through the mails in violation of 15 U.S.C. 77e(a)(1) or 77e(a)(2) (9 counts). He was sentenced to eighteen months' imprisonment on each of the first twenty-eight counts, to be served concurrently, followed by concurrent five-year suspended sentences and probation on each of the remaining nineteen counts, and was fined a total of $14,100.

In general the scheme disclosed by the evidence was that in 1956 petitioner and co-defendant George A. Mellen, a fugitive in Brazil who has not yet been brought to trial, acquired control of Belmont Uncle Sam Mining Company, a Nevada corporation organized in 1926, which had been inactive for at least ten years prior to its acquisition. They changed its name to Ambrosia Minerals, Inc. (AMI), and utilized it as a vehicle for the acquisition of other companies, sometimes followed by mergers. As a result of these

acquisitions and mergers, unregistered stock was issued and ultimately distributed to the public by the petitioner and Mellen. The books and records indicate that AMI never operated at a profit. Nevertheless, in order to induce investors to purchase its securities, McDaniel and Mellen artificially stimulated the market in AMI stock, made and distributed false and fraudulent statements, distributed false and misleading brochures, press releases, etc., and caused dividends to be issued which were not in conformity with the laws of the State of Nevada. In carrying out this scheme, the petitioner and Mellen made frequent use of the mails and of the means of interstate commerce.

At trial, the government's principal evidence was the testimony of various defrauded persons, the records of the corporation, and the testimony of several of its former officers, including John V. Persons, former President of AMI. On direct examination Mr. Persons testified that, at a meeting on October 29, 1957, presided over by the petitioner as Chairman of the Board, the Board of Directors of AMI instructed the corporate officers to bring suit against those persons responsible for irregularities in the company (R. I, 247–248, 250); that the attorney hired to prosecute the claim on behalf of the company requested that a memorandum be prepared giving a synopsis of the various irregular transactions that had taken place (R. I, 258–259); that Mr. Persons directed that the memorandum be drawn up (R. I, 263); that the memorandum was prepared in November 1957 by several officers of the corporation, *viz.*, Mr. Hinton Haynes, a co-defendant, who co-introduced the memo-

randum into evidence; Mr. Neil A. Rice; Mr. Robert White; Mr. Persons himself; and possibly Jim White [1] (R. I, 252); and that the memorandum was compiled from company files and the memory of various officers (R. I, 258–259). After some discussion as to whether it should be admitted into evidence and, if so, whether as an admission against Mr. Haynes or as a business record, the court allowed its introduction as a business record (R. I, 263). The memorandum was then read into evidence. It stated in general narrative terms certain misdeeds of the petitioner and of others. The civil action for which the memorandum was prepared was a suit to recover funds due the company (R. I, 250). All of the information in the memorandum relating to petitioner was independently proved by other evidence introduced at the trial.[2] The memorandum had been part of the permanent

[1] Mr. Robert White was present and available as a witness, but was not called by the petitioner. Messrs. Rice and Jim White were called by the government and were subject to cross-examination. Haynes declined to testify.

[2] The memorandum is found at R. 264–270. The following table shows the paragraphs in the memorandum pertaining to petitioner and the places elsewhere in the record where the same facts recited in each paragraph were proved.

Paragraph	Subject	Record References
I	Inside Trading and Stock Manipulations.	I, 71–201, 239–240; II, 725–742, 820–834, 970–971, 980.
III	Twentieth Century Fuels, Inc., Transactions.	I, 228–239.
IV	Texas Canyon Oil Transactions.	I, 235–236; II, 812.
VI	Purchase of Equity in Cessna 310 Airplane.	II, 701.
VIII	Purchase of Machinery from Brazas Engineering Company.	I, 401–407; II, 699–701.

records of the corporation for five years prior to the indictment in this case (R. I, 261–262).

ARGUMENT

1. Petitioner's main contention is that the trial court committed reversible error in allowing the memorandum on transactions detrimental to AMI to be introduced into evidence, but he has totally failed to show how he might have been prejudiced by the introduction of this document. To the contrary, as already noted, the record reveals that every fact in the memorandum pertaining to petitioner was properly introduced into evidence at other points in the trial. The memorandum was therefore cumulative, and if there were any error in its admission, it would have been harmless.

In any event, the admission of the memorandum was not erroneous. There is no authority for the proposition, which is the essence of petitioner's argument, that any papers prepared with a view to any litigation never can be admitted in that or any other litigation. (Pet. 8–14.) *See, e.g., Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122 (C.A. 2). The applicable test is trustworthiness; business records are admissible because they are by their nature documents which would normally speak the truth. V Wigmore, *Evidence* (3d ed.), Sec. 1422. The document at issue here meets the test. It was a part of the permanent records of the corporation, prepared long before the present indictment. It was prepared from the company files and the memories of

the corporate officers as a summary or history to be used by counsel retained to advise the company in effectuating legitimate business goals—the restoration of lost corporate assets and the protection of creditors and stockholders.

As the court below held, *Palmer* v. *Hoffman*, 318 U.S. 109, on which petitioner relies, is inapposite. This Court there affirmed the district court's exclusion from evidence of a railroad engineer's report concerning an accident for which his employer was potentially liable on the ground that the self-serving motive behind its preparation rendered the document suspect. Unlike the document in *Palmer*, the memorandum in this case was compiled largely from pre-existing records. Since it was designed as a summary of corporate transactions for the use of counsel in advising the corporation as to the best means of recovering lost assets, there is every reason to believe that the motive of those who prepared it was to make it as truthful and as accurate as possible. *Palmer* is also distinguishable from the present case in another respect. The Court observed (pp. 114–115) that the document involved there was analogous to the accident reports which railroads had been required to prepare since 1910 under 45 U.S.C. 38. Noting that 45 U.S.C. 41 prohibits the introduction of such reports in any suit arising out of the subject matter thereof, the Court expressed great reluctance to derogate from the implications of that long-standing statute by admitting the report as a business record. No such consideration weighs here.

Likewise without merit is petitioner's contention (Pet. 14–17) that he was denied the right to confront adverse witnesses by the admission of the memorandum when one of the officers who prepared it, co-defendant Haynes,[3] declined to testify in the trial. Petitioner overlooks the fact that the trial court admitted the memorandum into evidence as a business record, under a recognized exception to the hearsay rule. I Wigmore, *Evidence* (3d ed.), Sec. 142. It has long been settled that the right of confrontation is not a basis for excluding evidence otherwise admissible under the legitimate exceptions to the hearsay rule. *Salinger* v. *United States*, 272 U.S. 542; *Kay* v. *United States*, 255 F. 2d 476 (C.A. 4); *Matthews* v. *United States*, 217 F. 2d 409 (C.A. 5).

2. During the course of the trial, the government called James A. Swink, a certified public accountant and a member of the staff of the Chief Accountant of the Securities and Exchange Commission, who testified about his examination of the records of petitioner McDaniel. Mr. Swink had been furnished access to the records in McDaniel's office by McDaniel's accountant with McDaniel's permission (R. III, 1285–1291, 1302–1303, 1306–1307). Mr. Swink made summaries of these records which were introduced into evidence (*e.g.*, R. III, 1274). Trial counsel for petitioner examined Mr. Swink on *voir dire* but did not cross-examine him before the jury, though given the opportunity to do so.

Petitioner's contention (Pet. 21–22) that there was no predicate for the admission of the government's summaries is without merit. All that is required is

[3] Haynes was a co-introducer of the memorandum into evidence at the trial.

that the records on which the summaries are based be made available to the opposing party and that the compiler of the summaries be available for cross-examination. *Greenhill* v. *United States*, 298 F. 2d 405 (C.A. 5); IV Wigmore *Evidence* (3d ed.), Sec. 1230. Both requirements were fulfilled in this case (R. I, 428.)

Petitioner also questions the validity of the summaries, particularly as Mr. Swink's testimony differed from that of the certified public accountants whose audit was presented in behalf of the petitioner. Since Mr. Swink was an expert witness, he was entitled to testify concerning his inferences and conclusions. The fact that there was a difference in testimony is a matter of relative weight. The government witness explained the difference between his figures and those of the other accountants, who had treated results of sham transactions by petitioner and Mellen as profits, and it was up to the jury to accept or reject Mr. Swink's conclusions. The trial court properly charged the jury on the effect of this type of testimony (R. IV, 1649–1650).[4]

3. At trial, counsel for the petitioner made a request that the trial court instruct the jury that the indictment is not evidence (Pet. 20). The trial court

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[4] Petitioner's reliance on *Lloyd* v. *United States*, 226 F. 2d 9 (C.A. 5), is misplaced. The reversal in that case was placed on the ground that the court had improperly admitted evidence relating to an offer by the defendant to compromise his tax liability. The court of appeals in that case on page 16 (immediately before the part quoted on page 25 of the petition) noted that "the general rule is that the admission of such charts is discretionary with the trial court, and that its rulings thereon are subject to review only upon a clear showing of abuse and resulting prejudice to an accused."

assured counsel that it would give the charge (R. III, 1510–1511) and then instructed, "And the law permits nothing but legal evidence presented before the jury to be considered * * *" (R. IV, 1646). Shortly thereafter the court stated (R. IV, 1647), "The indictment which is before you is nothing more than a charge or accusation. It is a mere accusation which has never been fully tried until you were seated in the jury box." This instruction sufficiently informs the jury of the law. Moreover, at the close of the charge, the various counsel were permitted to make any objection desired to the charge (R. IV, 1668) in the absence of the jury. As no objection of any kind was interposed to the charge on behalf of the present petitioner, the trial court had every reason to believe that its charge was satisfactory.

Petitioner's contention (Pet. 17–21) that the charge to the jury should have been submitted to the jurors in writing is baseless. The very cases that petitioner cites hold that it is a matter of discretion in the trial court whether to furnish the jury with a copy of the charge in writing. *Copeland* v. *United States*, 152 F. 2d 769, 770 (C.A. D.C.); *Carrado* v. *United States*, 210 F. 2d 712, 722 (C.A. D.C.); *United States* v. *Standard Oil Co.*, 316 F. 2d 884, 896 (C.A. 7). There is no showing of abuse of discretion in this case.

4. Although not contesting the sufficiency of the evidence to show the fraudulent sale of securities or the use of the mails in the general scheme, petitioner argues (Pet. 26–30) that the particular mailings charged in each of the counts of which he was convicted were not in execution of the scheme and therefore that the evidence does not support his convic-

tion. As to counts 2 through 50, involving mailings of securities, stock certificates and confirmations by brokerage houses, petitioner argues that the scheme had been completed as to each customer before the particular mailing occurred. As to counts 51 through 56, he argues that there was no evidence to show that he caused the mailings of stock certificates, which where made by Joel Montgomery.

In a charge under 15 U.S.C. 77q(a), the gravamen is the sale of securities rather than the use of the mails, so that the rules developed in mail fraud cases as to whether the mailing is in execution of the scheme are not applicable. *Little* v. *United States,* 331 F. 2d 287, 292 (C.A. 8), certiorari denied, 379 U.S. 834; *United States* v. *Schaefer,* 299 F. 2d 625 (C.A. 7), certiorari denied, 370 U.S. 917. The indictment here tracked the statutory language and could not have narrowed the charges as did the indictment in *Getchell* v. *United States,* 282 F. 2d 681, 684 (C.A. 5). There, because the words "by the use of the mails" were syntactically detached from "the sale of securities", the court chose to read the indictment as if it charged that the mailings were "in execution of" the fraudulent scheme. The language of the present indictment is not capable of such a reading.[5] But even if the charge were so narrowly construed, the scheme revealed by the evidence here was

[5] The counts in question allege that "On [date], the defendants * * * in the Southern District of Texas, * * * did by the use of the mails in the offer and sale of Ambrosia common stock to [name] unlawfully, wilfully and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud * * *." R. IV, 1722, 1723.

so comprehensive that the mailings would be in furtherance of the scheme even under the rules applicable to charges under the mail fraud statute. See *United States* v. *Sampson*, 371 U.S. 75 (mailing acceptances of victims' applications for defendants' falsely promised services after defendants had obtained victims' money).

As to counts 51 through 56, Joel Montgomery testified that he had sold the shares to Mr. McDaniel in October and November 1957 and that he then disposed of some of them according to McDaniel's wishes (R. II, 735–741). There was thus ample evidence for the jury to conclude that petitioner was responsible for the mailings.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.